EMPLOYMENT TRIBUNALS

Claimant: Ms. P Cooke

Respondent: Secretary of State for Justice

Heard at: **London South, Croydon**
On: **14 May 2018**

Before: **Employment Judge Sage**

Representation

Claimant: In person

Respondent: Ms. Harrison Legal Representative.

RESERVED JUDGMENT

The Claimant's claim for unauthorised deduction from wages is not well founded and is dismissed.

The name of the Respondent is changed to the Secretary of State for Justice.

REASONS

1. By a claim form dated the 12 October 2017, the Claimant claimed that the Respondent had unlawfully deducted wages from her September 2017 pay. She stated that she had not requested unpaid leave nor had she authorized deductions to be made from her salary. She also stated that she had received no communication informing her that the deductions were to be made or when she was supposed to be on unpaid leave. The Claimant submitted that she was on 'approved leave' and attending the office.

2. The Respondent denied that the deductions were unauthorised. They stated that pay was deducted because the Claimant failed to report for work and was absent which was a breach of discipline. As the Claimant was recorded as being on an unauthorised absence pay was deducted. They however conceded in the ET3 that the Claimant had provided sick

notes for the period of the 23 September 2017 to the 6 October 2017 and was paid for these dates.

The Issues

The issues in this case were as follows:

3. Has the Respondent made an unauthorised deduction from the Claimant's pay – they claimed that the Claimant was absent without leave from the 29 August until the 22 September 2017 and therefore wages were deducted.
4. Was the Claimant absent without leave?
5. Was the Respondent entitled to deduct salary pursuant to clause 7 of her contract?

Witnesses

The Claimant and
Ms Scotcher for the Respondent

Findings of Fact

6. The Claimant commenced employment for the Respondent on the 5 November 1984 and had reached the grade of Band 5. The terms and conditions of employment in force at the relevant time were seen in the bundle at page 36. Paragraph 7 of the Claimant's terms and conditions of employment stated that deductions could be made from the Claimant's pay if she was absent due to an unauthorised absence.

7. The Claimant was found guilty of gross misconduct and it was concluded that she bullied and harassed her colleagues, the letter informing her of the outcome of the disciplinary panel was in the bundle was dated the 19 October 2016 at pages 30-33. The Claimant was told not to return to work at Haringey, Redbridge and Waltham Forest. The Respondent also told the Claimant that she would be line managed by Ms Heckroodt from the 1 January 2017. Although the Respondent could have dismissed the Claimant for gross misconduct, they applied an exemption and downgraded her to a Band 4 and moved her from her place of work.

8. The Claimant appealed the decision and the outcome was dated the 28 December 2016 (see pages 39-42 of the bundle). After the appeal decision was delivered it was again confirmed to the Claimant that she was not to return to her place of work (at the cluster of Haringey, Redbridge and Waltham Forest) and was moved to Hendon Magistrates Court (in the Barnet Enfield and Brent LDU) to commence duties on the 20 July 2017 reporting to Mr Hopwood. The Tribunal saw an email extract from Ms Heckroodt to the Claimant that confirmed this move and it also referred to the need for training (pages 51-53). In this email Ms Heckroodt referred to the requirement for bespoke training and advised the Claimant to meet with her manager on the 20 July to discuss what training she had completed since the list of training modules had been given to her on the 16 March 2017 and to discuss what was should be included in her training going forward. The Claimant was advised that her new manager was the person best placed to discuss additional training.

9. The Claimant did not report for work as instructed.

10. The Tribunal was taken to page 43 of the bundle which was a letter dated the 7 August 2017 from Ms Heckroodt to the Claimant (see paragraph 5 of the Claimant's statement) where she expressed concern that the Claimant had not contacted Mr Hopwood, her new line manager. The Claimant was advised that she needed to make urgent contact with Mr Hopwood. It was emphasized that "not reporting to work as instructed, is considered misconduct and further steps will need to be taken, unless you have valid reasons not to attend work and this has been agreed with your line manager". It was also confirmed in this letter that the Claimant had informed her that she had been unwell on the 20 July 2017 and that further absences were not related to ill health. The Claimant was advised that she should discuss the reason for her absences with Mr Hopwood.

11. The letter on page 43 was put to the Claimant in cross examination; she told the Tribunal that during this time she was "at work and reporting to [Ms Heckroodt]" and she explained that she had been "hot desking from Harlow and Waltham Forest and I was pushing for training from the Stevenage office". This did not seem to be consistent with the outcome of her disciplinary sanction that she was told not to return to her place of work at Waltham Forest or any of the offices in the cluster. Her evidence also did not appear to be consistent with the email in bundle at page 52 where Ms Heckroodt had given the Claimant clear instructions to report to Mr Hopwood on the 20 July 2017 at Hendon Magistrates Court. The Claimant's evidence about hot desking was not credible and the Claimant produced no evidence to show that during this time (in July and August 2017) she was attending work.

12. Mr Hopwood then wrote to the Claimant on the 9 August 2017 after leaving her a voicemail the day before. He asked the Claimant to contact him immediately. He stated in this letter (at page 44 of the bundle) that the Claimant was instructed to report to him on the 20 July 2017 and she had not done so and she had not returned his calls. He instructed her that she was due to attend work the following day. He informed the Claimant that "your continued unauthorised absence is a breach of discipline". If there had been any misapprehension by either party as to where the Claimant had been instructed to report for duties, this letter made it clear that she was expected to report to Mr Hopwood by the 10 August (after her failure to attend work from the 20 July) and to report to Hendon Magistrates Court. This letter also clarified that failure to attend as instructed would amount to misconduct. Although the Claimant told the Tribunal that it had been agreed with Ms Heckroodt that she could work in a different office, there was no evidence to suggest that this was the case.

13. The Claimant failed to contact Mr Hopwood and in her statement she explained (paragraph 8) that she objected to reporting to Mr Hopwood in the Hendon Magistrates Court because she would find it "extremely difficult" to get there from where she lived. Although the Claimant gave this as a reason for not contacting Mr Hopwood this objection was not raised at the time and was not referred to in her subsequent grievance.

14. The Claimant was also concerned that the decision to move her had been made without any consultation however the Tribunal noted that the Claimant was moved as an alternative to dismissal for gross misconduct, this was not a situation where consultation was necessary or required. If

the Claimant had not wished to be moved in accordance with the dismissal outcome the alternative was to face dismissal. It appeared however that the Claimant was unhappy with the decision to move her to a new cluster and was resisting the move.

15. The Claimant also claimed in her statement that the transfer to Hendon was “not in line with the assurance that I had received that bespoke training would be provided to enable me to return to work in a new role”. The tribunal has found as a fact above that bespoke training had been discussed with the Claimant and she had been provided with a list of training modules to complete and was required to discuss the future structure of her training with Mr Hopwood. There was no evidence that the Claimant had been told that she would be given training before she reported to her new role; the training was to be completed once she returned to work. The Claimant’s evidence on this point was not credible and was inconsistent with the documents in the bundle.

16. The Claimant was on agreed annual leave from the 14-28 August 2017.

17. The Claimant accepted in her statement that she never reported to Mr Hopwood because she “believed that his actions towards me to be bullying and harassment about which I subsequently submitted a grievance”. She also stated that she “objected to being compulsorily transferred” (paragraph 10 of her statement). The Claimant’s case was that she was “never absent” and she failed to present herself at the Hendon magistrates Court because she had a dispute with Mr Hopwood.

18. Mr Hopwood wrote to the Claimant on the 6 September 2017 (see page 55 of the bundle) stating that he had received no response to his letter of the 9 August 2017 and had received no sick notes to indicate that she was unfit for duties. He therefore concluded that she was fit for duties and, as she had failed to report to him on the 29 August 2017 as instructed, her pay had been stopped. The letter went on to state that if she failed to contact him by the 13 September 2017 to inform him of the details of her absence and/or return to work, disciplinary action would be taken.

19. The Claimant accepted that she did not respond to the letter of the 6 September 2017 because she had discussed this with her trade union representative and it was the view of her union representative that she had been bullied. The Tribunal find as a fact that by the date of this letter the Claimant had been given a clear warning that she was considered to be absent without leave and as a result her pay had been stopped. She was also warned that if she failed to contact him, disciplinary action would be taken. Even if the Claimant had been mistaken as to what had been agreed about the arrangements for her return to work, this letter emphasized that it was essential that she get in touch and provide a reason for her failure to attend work as instructed. Despite the clear warning that the Claimant was now considered to be absent without leave, she failed to engage with the Respondent to provide a reason why she failed to attend work or to explain to them that she considered that there was some impediment to her returning or that she was attending work as a result of some other alternative arrangement that had been made.

20. The Claimant consented to a home visit by Mr Hopwood on the 13 October 2017. In the Claimant's witness statement at paragraph 11, she alleged that during this meeting she informed him about the arrangement for her to report to Harlow and Stevenage offices and about her meeting with Ms. Heckroodt on the 12 September 2017, which she considered to be evidence of her attending work.

21. It was put to the Claimant in cross examination that she did not say in this meeting with Mr Hopwood that she had been at work during this time or show evidence to corroborate this and she replied, "I didn't think I needed to". The tribunal asked the Claimant why this was and she replied that she should have told him this and she explained that she "was doing what [she] had always done". However, the Tribunal noted from the facts of this case that it was not open to the Claimant to 'carry on as normal', she had been demoted and moved and was required to report to Mr Hopwood to start her new role. It was highly relevant to the facts of this case that the Claimant had been transferred to a different region and was assigned to a different line manager in consequence of the finding of bullying and harassment against her, it was concluded that it was not appropriate for her to work with those who had raised serious complaints against her. For the Claimant to continue on as if nothing had happened was not an option open to her.

22. It was the Claimant's case that she had attended work in September 2017 and was not therefore on an unauthorized absence. However, the Claimant could provide no evidence that she had reported to work in accordance with the reasonable instructions of her line manager and no evidence that she carried out any duties under her contract of employment. The Claimant told the Tribunal that she attended meetings with her trade union representative during September and had prepared documents for her grievance however the Tribunal find as a fact that attending to her grievance and seeking advice and assistance from her trade union could not be equated with attending work. There was no evidence that she had reported for work and carried out duties that had been assigned to her. It was the Claimant's case that she had carried out work in September 2017 and the Respondent unlawfully deducted wages from her.

23. It was the Claimant's case that the Respondent should have written to her informing her of the days that they believed that she had not worked, giving her an opportunity to respond. She stated that if the Respondent felt that she was ignoring an instruction the "proper course of action was to have instituted disciplinary action". The Tribunal noted however that this was what they did, they provided clear warnings that they considered her failure to report to Mr Hopwood to be a failure to attend work and they further warned her that failing to attend to Hendon would result in disciplinary action being taken, which would have resulted in dismissal, considering that she was on a final warning. The Claimant was also told on the 6 September that her pay had been stopped because of failing to attend work (and failing to submit sick notes) and warned that her failure to attend could result in disciplinary action being taken. The Respondent could not have been clearer setting out warnings and informing the Claimant of the action that would be taken if she failed to attend work.

24. The tribunal saw the grievance lodged by the Claimant in the bundle at pages 74-6 dated the 1 October 2017. The Claimant complained that she had not authorized the deductions and she had received no communications to warn her that the deductions would be made and she was not told what period the deductions covered. She stated that she believed the deduction to be a breach of contract.

25. It was noted that in the grievance document she confirmed that the business unit she was assigned to was "Barnet, Brent and Enfield LDU" this was the correct business unit. No reference was made in the grievance document to the evidence which she now wished to rely on in Tribunal, that she was attending work during the month of September at the Harlow and Stevenage offices (however this was referred to in her oral representations to the hearing).

26. The grievance was not upheld and the decision was on page 78 of the bundle. It was concluded that the Claimant had not contacted Mr Hopwood or replied to his letters and there was no evidence that she had been working at the Harlow or Stevenage Offices. It was concluded that there was no evidence to suggest that she had attended work after the 29 August 2017. It was also concluded that the Claimant had been warned that her pay would be stopped if she failed to report for duties. These findings were consistent with the evidence before them and was also consistent with the evidence before the Tribunal.

27. The Claimant denied she was on unauthorised absence from the 29 August to the 22 September 2017 however she accepted in cross examination that she had no evidence to prove that she attended work during this period and no evidence that she reported to Mr Hopwood as instructed.

The Law

Employment Rights Act 1996
Section 13(1)
"An employer shall not make a deduction from wages of a worker employed by him unless (a) the deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of a worker's contract.."

Submissions which were oral were as follows

28. **The Respondent's submissions** were in outline that from the 29 August to the 22 September 2017 the Claimant was absent without permission. The Respondent will say that clause 7 of the contract allows for pay to be deducted in these circumstances. The Respondent having written to the Claimant on the 7 and the 9 August, 6 September and the 5 October, the Claimant was on notice that her pay would be stopped in December due to her taking unauthorised absence. At no point during this time, did the Claimant give any indication she was working in Harrow or at any other venue. It is not accepted by the Respondent that the Claimant attended work throughout this period therefore her pay was stopped.

29. It was only as a result of her pay being stopped did the Claimant make contact with the Respondent and she raised a grievance. In this grievance she identified dates of absences (see page 74 of the bundle). That grievance was dealt with on the 7 February 2018 see page 78.

30. The Claimant appealed by letter of the 21 December 2017 (see page 59) and two absences were accepted as sick leave and her annual leave of the 14-28 August. The Respondent say they were entitled to make the deduction and it was therefore not unauthorised. The Respondent will say that the Claimant was overpaid by £118.05.

31. The **Claimant's submissions** were that she was attending work throughout September and the practice was agreed with Ms Heckroodt, when the Claimant returned to work on the 27 February 2017 her work pattern did not change. The Claimant stated she was at work and didn't get letters from Mr Hopwood because she was on holiday. The Claimant confirmed that she had a meeting with Mr Hopwood on the 13 October 2017 and it was quite clear to her that he did not know about her working practices, working at Harrow and attending OH appointments or working at Mitre House and attending Stevenage to work and to do on-line training.

32. It wasn't until the Tribunal contacted my employer that the Respondent decided to look at her pay, that is why they made this adjustment at the end of January 2018.

33. The Claimant stated that she still did not know what they paid her on sickness absence and she tried to meet them but it was not possible. The Claimant stated that she was unclear as to what she had been paid in January 2018. The Claimant confirmed that she was claiming £2192.07 gross pay.

Decision

34. Although the Claimant's claim was in respect of the pay deduction made from the 29 August to the 22 September 2017, it was necessary to make findings of fact about the duties assigned to her at this time. The essential facts of this case were that the Claimant had been moved as a result of a disciplinary sanction and it was not an option for the Claimant to 'continue on as normal' however this appeared to be what she was telling the Tribunal. There appeared to be a lack of acceptance of the conclusions reached by the disciplinary panel and the Claimant appeared to be in denial of the consequences of the final decision of the disciplinary appeals panel.

35. The Claimant had been moved to a new business unit to work under Mr Hopwood; she refused to respond to his letters or to report for work as instructed. She gave a number of reasons for failing to do so, firstly the new location was difficult to get to, he was bullying her, there had been no consultation and there was a bespoke training program that had been agreed to enable her to return to work. Findings of facts have been about all these reasons above and none were found to be credible on their facts and none justified her decision not to report for duty as instructed.

36. The Claimant having provided no credible reason as to why she was absent from work during this period of time, the facts show that she was absent without authorisation. Although the Claimant told the Tribunal that she was attending work at other offices and carrying on as normal, this was not an option open to her and there was no evidence to suggest that her decision to do this had been approved by Ms Heckroodt. There was no credible evidence to suggest that the Claimant was reporting for work during this period.

37. The Claimant has raised in her closing submissions that she did not get the letters sent to her by Mr Hopwood because she was on holiday however this was inconsistent with her evidence given in cross examination and with the evidence before the Tribunal. The Claimant accepted in cross examination that she received the letter of the 6 September (after her annual leave) and she had discussed the contents with her trade union and they concluded that his actions were bullying. The letter Mr Hopwood sent to the Claimant on the 9 August was sent before she went on holiday; there was no evidence to suggest that the Claimant did not get this letter (which were all sent to the correct address). All the evidence suggested that the Claimant was in receipt of these letters and was aware that she was required to report to Mr Hopwood at Hendon, but failed to do so. The Claimant was therefore absent without authorisation

38. Having concluded that the Claimant was absent without authorisation, clause 7 of the contract allows the Respondent to deduct wages for this period. The Respondent was entitled under clause 7 to make a deduction from the Claimant's wages where there was an unauthorised absence from duties. The deduction was made in accordance with this clause. I conclude that this deduction was made in accordance with Section 13(1) Employment Rights Act; it was therefore authorised.

39. I conclude that the deduction was authorised.

40. The Claimant's claim is not well founded and is dismissed.

Employment Judge **Sage**

Date 23 May 2018